



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

rwadlow@sidley.com
(202) 736-8215

BEIJING
BRUSSELS
CHICAGO
DALLAS
FRANKFURT
GENEVA
HONG KONG
LONDON

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C.

FOUNDED 1866

November 9, 2007

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *DTV Consumer Education Initiative*, MB Docket No. 07-148
Ex parte presentation of Fox Television Stations, Inc.

Dear Ms. Dortch:

Fox Television Stations, Inc. ("Fox") hereby submits these *ex parte* comments on the Commission's proposed requirements that broadcasters air certain government-mandated content in the form of public service announcements ("PSAs") regarding the digital television ("DTV") transition. Such regulations not only are unnecessary in light of the extensive consumer education campaign voluntarily undertaken by the broadcast industry, but are contrary both to the Commission's statutory authority and the First Amendment's proscription on compelled, government-mandated speech.

First, there is no need for the Commission to impose any DTV consumer education requirements on broadcasters, because broadcasters, including Fox, are already engaged in their own voluntary consumer education campaign. For example, from October 22, 2007 through October 30, 2007, the Fox network inserted five separate PSAs regarding the DTV transition into its network programming. Each of these DTV PSAs aired during Fox's weekday prime time programming, at a total value of over \$260,000. In addition to these network spots, Fox's owned and operated local television stations aired several hundred 15- and 30-second DTV PSAs in various day-parts during the week of October 28, 2007.

In addition to the efforts of Fox and other individual broadcasters, the industry as a whole continues to engage in extensive efforts to educate consumers about the DTV transition. As described in its recent submission in this proceeding, the National Association of Broadcasters ("NAB") has embarked on a \$697 million campaign to alert consumers to the transition using a variety of communication methods, including crawls during programming, 30-minute educational programs on the DTV transition in both English and Spanish, website promotions,

Marlene Dortch
November 9, 2007
Page 2

and cross-country road shows. This plan also includes the very PSAs the Commission currently is considering requiring of broadcasters, including 10-, 15- and 30-second spots airing in all day-parts on network, syndicated, and locally-originated programming. In short, broadcasters already have a substantial interest in educating the viewing public about the coming transition and are undertaking extensive voluntary efforts to ensure that the transition goes smoothly. No party has even remotely made the case that intrusive government mandates are required.

Second, the Commission has no statutory authority to impose any such mandates on broadcasters. The Commission cites numerous provisions of the Communications Act in its NPRM for the authority to mandate DTV PSAs, *see* NPRM, App. A § B, but none of these sections of the Act provides specific authority for the Commission to impose PSA requirements. And where there is no specific authority, the Commission cannot rely on its general authority – especially when the Commission’s mandate would dictate the content of broadcast programming. *See Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) (“where, as in this case, the FCC promulgates regulations that significantly implicate program content, § 1 is not a source of authority”). Indeed, if anything, Section 326 would require the Commission to construe the statute to preclude such authority, because that section expressly prohibits the Commission from issuing any “regulation or condition” that “interfere[s] with the right of free speech by radio communication.” *See* 47 U.S.C. § 326.

Finally, any attempt by the Commission to impose DTV PSA requirements on broadcasters would be unconstitutional. A government mandate such as this one that dictates what a broadcaster must say and when and how it must say it violates the First Amendment absent a substantial government interest. *See United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797 (1988). This includes compelled speech about factual matters, such as the DTV transition, as well as political speech. *Riley*, 487 U.S. at 798-99. “[T]he fundamental rule of protection under the First Amendment is that a speaker has the autonomy to choose the content of his own message.” *Hurley v. Irish-America Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

The First Amendment’s proscription against government-mandated speech applies with full force to broadcasters’ speech. Even under the “more intrusive regulation of broadcast speakers” permitted by the Supreme Court (*see Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637 (1994)), direct restrictions on what is said must be “narrowly tailored to further a substantial governmental interest.” *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). Unlike content-neutral restrictions which by their nature “are not designed to favor or disadvantage speech of any particular content,” (*see Turner Broad. Sys.*, 512 U.S. at 652), the Commission’s proposed DTV PSA requirements are in fact designed to favor specific, government-mandated content. “Mandating speech that a speaker would not otherwise make necessarily alters the

Marlene Dortch
November 9, 2007
Page 3

content of the speech.” *Riley*, 487 U.S. at 795. Such compelled speech is inconsistent with broadcasters’ First Amendment rights.

Even if the government’s interest in promoting the DTV transition could be considered substantial, the proposed requirement for DTV PSAs is not narrowly tailored to serve that interest. As illustrated above, and in the comments filed by numerous broadcasters in this proceeding, education of the public about the DTV transition is proceeding apace, even without the heavy hand of government mandating the message consumers must be given by their local broadcasters. If the government is interested in spurring the educational effort, it is of course free to adopt its own public education campaign, or to purchase spots on local broadcast and cable channels to promote its message. These less restrictive alternatives to mandating broadcasters’ speech render the proposed DTV PSA requirements unconstitutional. *See Reno v. ACLU*, 521 U.S. 844, 874 (1997) (finding the burden on speech unjustifiable if “less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve”); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (permitting government regulation to promote a compelling government interest if “it chooses the least restrictive means to further the articulated interest”). Indeed, the fact that the government could purchase its own time to air PSAs makes these proposed regulations especially troubling: the Commission would essentially be using its rulemaking authority to compel broadcasters to provide free air time for the promulgation of a government message – air time that the government would otherwise have to pay many millions of dollars to purchase. Under those circumstances, forced speech implicates not only the First Amendment but also the Takings Clause. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 24 (1986) (Marshall, J., concurring) (finding forced subsidization of a third party’s speech unconstitutional even where, unlike here, “the interference with [PG&E’s] speech is, concededly, very slight”); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994) (construing the Communications Act to preclude authority to promulgate regulations that could subject the Government to takings liability).

For the foregoing reasons, the Commission should refrain from imposing mandatory requirements on broadcasters to air PSAs regarding the DTV transition.

Respectfully submitted,



R. Clark Wadlow
Counsel for Fox Television Stations, Inc.